

**Copps Foods and Mary Klika.** Case 30-CA-13044

June 16, 1997

**DECISION AND ORDER**BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HIGGINS

On January 27, 1997, Administrative Law Judge Judith Ann Dowd issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt her recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the complaint is dismissed.

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that the Respondent lawfully discharged Charging Party Mary Klika, we note that the credited evidence clearly establishes that the decision to discharge her was made before the occurrence of her alleged protected concerted activity, i.e., Klika's discussion with employees Diane Stueber and Lucinda Jameson regarding the posting of lead positions. In these circumstances, we find it unnecessary to rely on the judge's discussion of whether Klika's discussion with Stueber and Jameson was concerted or protected.

*Joyce Ann Seiser, Esq.*, for the General Counsel.

*John S. Schauer, Esq. (Seyfarth, Shaw, Fairweather & Geraldson)*, of Chicago, Illinois, for the Respondent.

**DECISION****STATEMENT OF THE CASE**

JUDITH ANN DOWD, Administrative Law Judge. This case was heard in Appleton, Wisconsin, on September 30, 1996. The charge was filed on September 13, 1995, by Mary Klika, an individual (Klika). On May 10, 1996, the Regional Director for Region 30 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (complaint). The complaint alleges that Copps Foods (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Mary Klika because she engaged in protected concerted activities. The Respondent filed an answer on May 14, 1996, denying the commission of any unfair labor practice.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On the entire record, including my observation of the demeanor

of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

**FINDINGS OF FACT****I. JURISDICTION**

Copps Foods, a corporation with an office and place of business in Appleton, Wisconsin, is engaged in the retail sale of groceries and related items. During the calendar year ending December 31, 1995, Respondent purchased and received goods and material valued in excess of \$50,000 directly from suppliers located outside the State of Wisconsin. At all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICE****A. Background****1. The Appleton store**

The Respondent is a grocery retail and wholesale company which operates 17 stores. On June 27, 1995, Copps opened a store at 2400 West Wisconsin Avenue in Appleton, Wisconsin (the Appleton store). There are currently 270 employees assigned to the Appleton store. The store is divided into 15 departments such as dairy, meat, bakery, video, etc. The store's management offices and the timeclock are located on the second floor of the building. The store manager's office is next to the bookkeeping office and the department managers share an office located across the hall. Mike Mesich has been the manager of the Appleton store since it opened. Susan Johnson is the bakery department manager. Both Mesich and Johnson are supervisors within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.<sup>1</sup>

**2. The bakery department**

When the Appleton store opened, Ed Crowgey was appointed manager of the bakery department. Crowgey had previously been employed as a baker in the Respondent's Green Bay store. Mary Klika, who was employed as a night baker in the Green Bay store, applied to Crowgey for a position in the Appleton store. Crowgey offered her a job and she transferred to Appleton with a pay increase from \$8.50 per hour to \$9 per hour. The stated reason for the pay increase was "transfer more responsibility." Klika began working in Appleton on June 19, 1995. She was the only baker working days at the Appleton store. Around the same time, Crowgey hired Cindy Jameson as lead cake decorator and Dianna Stueber as lead counter person. Neither Jameson nor Stueber had previously worked for the Respondent.

Several months after the Appleton store opened, the Respondent posted a notice seeking applications for the position of lead baker at that location. Susan Johnson, the lead baker at the Green Bay store, was one of the applicants for the job. Johnson was interviewed and hired by Crowgey. Johnson began working in Appleton on August 21, 1995. Crowgey told Klika that she and Johnson would both be lead bakers. Crowgey told Johnson that she would be working on an

<sup>1</sup> Respondent so admitted in its answer to the complaint.

equal basis with Klika because the latter did not take direction well.

Three days after Johnson began working at Appleton, Ed Crowgey was removed from his position as bakery manager, demoted back to baker, and transferred to Green Bay. Johnson was appointed to assume the position of bakery manager. Shortly thereafter, Johnson and Mesich decided to post a notice seeking applications for the position of lead baker. Johnson suggested that she should talk to Mary Klika before the opening was actually posted because Klika believed that she was already entitled to the job, since she had been running the bakery alone for 3 months.

#### B. Events Of August 31, 1995

On August 31, 1995, Johnson asked Klika to come in to the department managers' office to talk to her. Klika punched out and came into the office, leaving the door open. Johnson told Klika that the lead baker position was being posted. Klika responded that she already occupied that position. Johnson told her that they were posting the lead baker job so that everyone could apply and that Klika should apply for the job. Klika stated that she should not have to apply for a job she already had. Johnson stated that Klika's application indicated that she was classified as a baker. Klika reiterated that she had come to Appleton as lead baker. Johnson responded that the lead baker job would be posted. Klika started for the door and in a loud, angry voice said: "This is f—king bullshit. This is one asshole company to work for," and walked out.<sup>2</sup> Respondent's bookkeeper, Cornelia Gossen, came into Johnson's office and commented to Johnson about how angry Klika had been. Johnson attempted to contact Mesich, the store manager, but he did not respond to her page.

After Klika left Johnson's office, she sat down at a table outside of the store to smoke a cigarette and calm down. Klika saw Mesich walking towards the store and she asked to speak to him. Klika told Mesich that Johnson had informed her that the lead baker position was going to be posted and that the job belonged to her. Klika also told him that she had said to Johnson that this was "bullshit." Mesich responded that he would terminate anyone who talked to him like that. Mesich also said that he would talk to Klika the next day after he had an opportunity to discuss the matter with Johnson.

Mesich returned to his office. Johnson came in and reported that Klika had "sworn and cussed at her" and asked Mesich what she should do. Mesich indicated that as far as he was concerned Klika was terminated. Johnson hesitated and Mesich told her that he wanted her to be part of the decision making and that she should think about it overnight. Johnson and Mesich then went to the bookkeeper's office and asked what she had heard. Gossen confirmed that she

<sup>2</sup>I discredit Klika's testimony that she merely stated to Johnson "this is bullshit." Susan Johnson credibly testified to Klika's use of the stronger language quoted above. Johnson's version was partially supported by bookkeeper Cornelia Gossen, who remembered Klika using the word "f—king" and making a vulgar remark about the Respondent. As far as the record shows, Gossen was a disinterested observer with no reason to exaggerate Klika's language. Gossen also appeared to be a credible witness who testified in an honest and straightforward fashion. As discussed below, I did not find Klika to be a reliable witness.

had heard Klika used the words "bullshit" and "f—king" when talking to Johnson.

#### C. Events of September 1, 1995

On September 1, 1995, Johnson arrived for work at 6 a.m. About 6:40 a.m., Johnson went to Mesich's office and waited for him to arrive. When Mesich came in, Johnson told him that she had decided that Klika should be terminated because it was the best thing for the bakery department. Johnson stated that she did not want to tolerate language such as Klika had used towards her and that she did not want such conduct to affect other employees. Mesich said that he would terminate Klika as soon as he cleaned off his desk.

Klika arrived at work around 7 a.m. After she punched in she went down to the bakery department and talked to lead cake decorator Cindy Jameson and lead counter person Dianna Stueber. Klika told them that her job as lead baker was being posted and that Johnson had told her that Jameson's and Stueber's positions would be posted as well.<sup>3</sup> Klika admonished them not to repeat to Johnson what she had just told them about their jobs being posted.

Subsequently, Johnson came in to the bakery area and was approached by Jameson and Stueber. The employees told Johnson that Klika had informed them that their jobs were being posted. Johnson assured them that they had no need to worry and that they were excellent workers. Johnson then called Mesich and reported that Klika had told other employees that their jobs would be posted and that she was "stirring up trouble." Mesich told Johnson to bring Klika up immediately so that she could be discharged.

Johnson escorted Klika to Mesich's office. Mesich asked Klika whether she had been talking to fellow employees and she replied "yes." Mesich told Klika that she was going to be terminated due to her language towards Johnson and for insubordination. Mesich gave Klika a change of status form to sign, indicating that she was discharged for insubordination. Klika signed the form and Johnson then escorted Klika out of the store.

#### III. DISCUSSION AND CONCLUSIONS

Section 8(a)(1) of the Act makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7." 29 U.S.C. 158(a)(1).

<sup>3</sup>I credit Johnson that she did not tell Klika that Cindy Jameson's job as lead cake decorator and Dianna Stueber's job as lead counter person would also be posted. I found Johnson to be a thoroughly credible witness. Johnson was calm and confident in her testimony and she appeared to be a sincere person who testified to the best of her recollection.

Klika, on the other hand, completely failed to mention that Johnson had told her that the other lead jobs would be posted during her initial recounting of her conversation with Johnson at the hearing. Klika only added the alleged statement by Johnson about the other lead jobs after counsel for the General Counsel pointedly reminded her. Klika also admitted on cross-examination that she had failed to mention Johnson's alleged statement about posting other jobs when Klika testified at a prior unemployment compensation hearing.

In short, Johnson credibly denied telling Klika that the other lead jobs would be posted and Klika only belatedly and unconvincingly testified that Johnson had made that statement. I therefore find that Johnson made no reference to posting any job except that of lead baker during her conversation with Klika.

One of the rights guaranteed in Section 7 is the right to engage in "concerted activities . . . for the purpose of mutual aid or protection." 29 U.S.C. 157. The Board has held that in order to find that activities are concerted, the employee activities must have been "engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 497 (1984). Under the *Meyers* analysis, an 8(a)(1) violation will be found if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected under the Act, and the adverse employment action at issue was motivated by the employee's protected concerted activity. *Id.*

The Respondent contends that it discharged Klika for insubordination based on the vulgar language she used in talking to Supervisor Susan Johnson. The General Counsel contends that Respondent discharged Klika for engaging in a conversation with employees Jameson and Stueber which constituted protected concerted activity.

#### A. Knowledge and Animus

The credited evidence shows that Klika used vulgar language, including "f—king bullshit" and "asshole company" in response to her supervisor, Susan Johnson, when the latter told Klika that the job of lead baker would be posted. Tom Mesich, the store manager who formally discharged Klika, told her that he would fire any employee who used even the "bullshit" language Klika admitted to, in talking to him. Shortly thereafter, Mesich and Johnson conferred about the incident and what action should be taken against Klika. Mesich wanted to discharge Klika immediately, but Johnson was reluctant to agree to the discharge. However, after considering the matter overnight, Johnson told Mesich first thing in the morning that she had decided that Klika should be discharged. At that point all that remained to accomplish the discharge was to inform the employee, which Mesich agreed to do as soon as he attended to some paperwork. Thus, at the time the discharge decision was reached, Mesich and Johnson knew about Klika's use of vulgar language toward a supervisor—the stated reason for her discharge—but they had no knowledge of any even arguably protected activity by Klika.<sup>4</sup>

Counsel for the General Counsel points out, however, that just prior to the actual discharge, Respondent learned that Klika had told employees that their lead jobs would be posted. Mesich even questioned Klika about these discussions at

<sup>4</sup>In her brief, Counsel for the General Counsel cites instances where other employees engaged in misconduct, some of which involved the use of vulgar language, and were not immediately discharged by the Respondent. None of the incidents are on all fours with Klika's conduct here. Johnson was just taking over management of the bakery from an individual who had been demoted for failing to properly control the bakery department. Upper management apparently perceived the bakery department as being a problem. Johnson may therefore have been particularly sensitive to perceived insubordination by an employee with whom she had recently been working as an equal. Under these circumstances, Klika's vulgar language toward Johnson may have been viewed more seriously than incidents where employees used vulgarity to each other or in the hearing of customers. It is well established that an employee can be discharged for any reason as long as the reason is unrelated to activity protected by the Act.

the beginning of the discharge interview. However, the fact that Mesich learned that Klika had told other employees that their jobs would be posted is not, in itself, sufficient to show that Mesich knew, or reasonably should have known, that Klika was engaging in arguably concerted activity. There is no evidence here that Klika enjoyed a leadership position among the employees, that she was perceived as an employee leader by management, that she had attempted to organize employees in the past, or that she had previously engaged in any protected concerted activity whatsoever. Klika never stated or suggested to the Respondent that she intended to organize employees in some kind of protest. There is also no evidence showing that Mesich and Johnson ever planned to post any lead job but that of lead baker. Accordingly, the managers had no reason to believe that Klika had any concerted objective in telling employees that their jobs would also be posted. I therefore find that knowledge of the possible concerted nature of Klika's activities cannot be attributed to the Respondent. See *Amelio's*, 307 NLRB 182 (1991); *Walter Brucker & Co.*, 273 NLRB 1306 (1984); and *New England Fish Co.*, 212 NLRB 306, 310–311 (1974).

There is no record evidence tending to show that the Respondent, in general, or Mesich and Johnson, in particular, harbored any animus toward employee concerted activity. There is no evidence that the Respondent ever discharged, or otherwise disciplined any employee for talking to employees about matters of mutual concern, or for engaging in any other concerted activity. Indeed, when Jameson and Stueber approached Johnson about whether their jobs would be posted, they were engaged in unmistakable concerted activity. Neither Johnson nor Mesich reacted negatively to the employees' joint inquiry. On the contrary, Johnson reassured them that she considered them to be excellent employees.

#### B. The Alleged Concerted Activity

The General Counsel contends that Klika engaged in protected concerted activity because she talked to employees Jameson and Stueber about a matter of mutual concern—the security of their lead positions. The Board has recognized that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." *Meyers Industries*, 281 NLRB 882, 886 (1986). The Board has long held that a conversation may constitute concerted activity. *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951). However, not every employee conversation is concerted in nature. Rather, the Board has held that for a conversation to qualify as concerted, rather than individual activity, "it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." *Vought Corp.*, 273 NLRB 1290, 1294 (1984), quoting with approval from *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

Here, Klika told employees Jameson and Stueber that the Bakery Manager Susan Johnson had told Klika that the job of lead baker would be posted and that Jameson's and Stueber's lead jobs would also be posted. The credited evidence shows that Johnson never said that any job other than lead baker would be posted. The evidence further shows that Klika admonished Jameson and Stueber not to tell Johnson what she had said about their jobs being posted.

By falsely telling Jameson and Stueber their jobs would be posted, Klika attempted to embroil the employees in her individual dispute with the Respondent over its decision to post the position of lead baker. Klika simply could have presented the employees with the fact that the lead baker job was being posted and attempted to win their support to protest this action in concert with her.<sup>5</sup> Klika could also have tried to convince the employees that their job titles were in jeopardy because the lead baker position was being posted. Such efforts could be defended as at least arguably concerted activity. Rather than attempting to persuade the employees that they shared a common interest in the security of their lead positions because of management's adverse action against her, however, Klika chose the easier path of falsely telling the employees that management intended to also post their jobs. Whatever Klika intended to accomplish by doing so, it was not to induce the employees to engage in group action. Indeed, she specifically told the employees not to talk to Johnson about management's alleged decision to post their jobs. The employees went to Johnson anyway, and were assured by her that there was no plan to post their jobs. Under these circumstances, I find that Klika was engaged in individual, and not concerted activity, when she told employees that their jobs would be posted. See *Access Control Systems*, 270 NLRB 823 (1984); *American & Efrid Mills*, 269 NLRB 1077, 1077 (1984); and *Meyers Industries*, supra.

In any event, it is well established that an employee's activities lose the protection of the Act if the asserted protected statement is deliberately false. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1966). On the facts of this case,

either Johnson said she would post the other jobs or she did not. I credited Johnson's testimony that she did not make such a statement, based on the factors discussed infra, fn. 3. I also note that Johnson's denial of any stated intention to post other jobs is supported by the facts that Johnson was apparently not at all flustered or hostile when Jameson and Stueber confronted her about this matter and that the Respondent never actually posted the other lead jobs. The issue here is not one of a possible misinterpretation of a supervisor's remarks—either Johnson said the other jobs would be posted or she did not. Klika never suggested during her conversation with the employees or in her testimony at the hearing that she might have misunderstood Johnson. Once Klika was reminded of her omission by counsel for the General Counsel, she testified with assurance that Johnson said she would also post the other lead jobs. The deliberate nature of the falsity may also explain why Klika was so anxious not to have Jameson and Stueber repeat her remarks to Johnson. I find that Klika's statement to employees that she was told by Johnson their lead jobs would also be posted was intentionally false.

Based on the foregoing, I conclude that the General Counsel failed to present sufficient evidence to establish a prima facie showing that Klika was discharged for engaging in protected concerted activity. Even assuming, arguendo, that the General Counsel is found to have established a prima facie case, I find that Respondent has met its burden of showing that it would have terminated Klika for insubordination regardless of any protected conduct.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

Having found insufficient evidence to support a finding that the Respondent violated Section 8(a)(1) of the Act by discharging employee Mary Klika, I recommend that the Board dismiss the complaint in its entirety.

<sup>5</sup> It is unclear from the record whether Klika actually held the position of lead baker as the General Counsel contends, or she was classified only as a baker, as Respondent contends. Former Bakery Manager Ed Crowgey might have been able to shed light on this subject but neither party chose to call him as a witness. Both parties claim that the other should have done so. I cannot draw any adverse inference against either party because Crowgey was equally available to both sides. Although Crowgey was apparently still employed at Respondent's Green Bay store, as far as the record shows, he was no longer a manager and had been removed from his supervisory position by Respondent. Under these circumstances, it cannot be assumed that Crowgey could be expected to give evidence favorable to the Respondent. In any event, I find it unnecessary to decide whether Klika was actually classified as lead baker, since I find from the evidence that she reasonably believed she held that position.

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.